IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROGER DALE LATHAM **APPELLANT**

VS. **CIVIL ACTION NO. 2015-TS-00722**

TERRY W. JOHNSON,
JOHN W. ROBINSON III AND
CRAIG TRAHAN **APPELLEES**

RESPONSE TO MOTION TO SUSPEND RECORD PREPARATION WITH MEMORANDUM INCORPORATED

COMES NOW ROGER DALE LATHAM, by and through his attorney of record, J. Edward, responding to Appellees Motion Suspend Record Preparation (hereafter sometimes referred to as the "Motion"), as follows

1. The allegations of paragraph 1 of the Motion are admitted.

2. The allegations of paragraph 2 of the Motion are denied. The Judgment entered January 15, 2015, is final, accurate and completely reflective of the jury award.

3. The allegations of paragraph 3 are denied, as the Appellant does not believe that the Appellees are entitled to attorney's fees or pre-judgment interest, and upon the conclusion of this appeal Appellant believes that this Court will agree that the Judgment entered January 15, 2015, will be reversed and no post-judgment interest will lie.

4. The allegations of paragraph 4 are admitted as they state what the Appellees want in connection with their Motion now before the Sunflower Circuit Court, but Appellant denies that the relief should be granted.

5. The allegations of paragraph 5 are admitted as they state what the Appellees want in connection with their Motion now before the Sunflower Circuit Court, but Appellant denies

that the relief should be granted.

6. The allegations of paragraph 6 are admitted.

7. The allegations of paragraph 7 are admitted.

8. The allegations of paragraph 8 are denied.

9. The allegation of paragraph 9, in so far as it states that dismissal of the appeal is not sought by the Appellees, however, all other allegations of paragraph 9 of the Motion are denied.

10. The allegations of paragraph 10 are denied.

11. The allegations of paragraph 11 are denied.

12. The allegations of paragraph 12 are denied.

13. The Appellant denies that the Motion of Appellees should be sustained, and assert that the Motion should be dismissed and that Appellant be discharged in the premises of this Motion with the award of reasonable attorneys fees for having to defend this Motion.

MEMORANDUM OF FACTS AND LAW

The following is a Memorandum of Facts and Law was prepared by Hon. Preston Rideout, one of the Appellants lawyers that tried this case, which Memorandum was prepared in Response to the Appellees' Motion for Attorney's Fees, Pre-Judgment Interest and Post-Judgment Interest now before the Sunflower Circuit Court. All credit for the Memorandum is given to Hon. Preston Rideout for this presentation. It is meant as an aid of the Supreme Court in the processing of the Motion currently before the Court.

Statement of Facts

On March 14, 2011, the three Plaintiffs filed a complaint against the defendant, Roger Latham, seeking damages from him on the theories of:

1. Breach of A Partnership Agreement;

2. Tortious Breach of A Partnership Agreement;

3. Breach of Fiduciary Duties;

4. Misappropriation and Conversion of Partnership Assets;

5. Malicious, Intentional and Wanton Conduct; and,

6. Fraud, Deceit and Misrepresentation.[1]

On December 14, 2014, the Plaintiffs submitted Plaintiffs Jury Instructions to the Court. These included instructions which submitted the case to the jury on a general verdict.[2] Plaintiffs proposed jury charge also instructed the jury on compensatory damages[3] as well as punitive damages.[4]

On December 19, 2014, the jury awarded the Plaintiffs a verdict in the amount of $176,352.24. The Sunflower County Circuit Court denied the Plaintiffs' motion to submit the case to the jury on punitive damages.

The court asked Plaintiffs' counsel whether he could cite the court to any similar cases where punitive damages had been awarded. Because Plaintiffs' counsel could not cite the court to relevant authority so holding, the court decided the case was not one appropriate for punitive damages and did not re-submit the case to the jury on punitive damages.

Plaintiffs are before the Sunflower County, Mississippi, court on their post-trial motion filed on January 29, 2015, seeking an award of attorneys' fees and expenses in the aggregate amount of

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[1] See Plaintiffs' Complaint filed on March 14, 2011.

[2] See Exhibit (A) attached to Defendant's Response In Opposition which is the cover letter and pleading submitting the jury instructions to the Clerk's Office for filing.

[3] See the instructions attached to Defendant's Response In Opposition as Exhibit (B).

[4] See the instructions attached Defendant's Response In Opposition as Exhibit (C).

$151,237.99.[5] Plaintiffs also seek an award of pre-judgment and post-judgment compound interest in the amount of 8% from December 19, 2014, "until the damages are paid in full."[6]

The Motion Is An Untimely Filed Rule 59(e) Motion To Alter or Amend A Judgment And Even If Treated As Timely, Plaintiffs Meet None of the Requirements of the Rule

If there is an independent basis, such as a statutory or contractual right, for an attorneys' fee award, the matter may be treated as collateral. However, in the absence of an independent right, a motion for an award of attorneys' fees is treated as a Rule 59(e) post-judgment motion to alter or amend a judgment. Fulton v. Miss. Farm Bureau Cas. Ins. Co., 105 So3d 284, 287 (Miss. 2012).

In this case judgment was entered on December 19, 2014. Plaintiffs did not file this Rule 59(e) motion for attorneys' fees until January 29, 2015; 41 days later. Rule 6(b), Miss. R. Civ. P., bars the court from extending the time within which to file a Rule 59(e) motion. The Plaintiffs filed their motion 31 days after the 10 day post-judgment Rule 59(e) filed deadline had passed. The motion should be denied as having been untimely filed.

Even assuming *arguendo* it had been timely filed, in order to succeed under Rule 59(e) the Plaintiffs would have to show: (1) An intervening change in controlling law; (2) Availability of new evidence not previously available; or, (3) A need to correct a clear error of law to prevent manifest injustice. Fulton v. Miss. Farm Bureau Cas. Ins. Co., *supra.,* 105 So3d at 287.

None of these things have been alleged in the motion and none can be proven. For their failure to meet the proof requirements of Rule 59(e), the Plaintiffs motion to amend the judgment to add an award of attorneys' fees should be denied as without merit. Conversely, the Motion to Suspend the Record in this case is without merit.

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[5] For the amount see the Plaintiffs' January 28, 2015, motion at page 4.

[6] For the amount see the Plaintiffs' January 28, 2015, motion at page 9.

> The Law States that, In Certain Circumstances, Attorneys' Fees May Be Awarded In Lieu of Punitive Damages. The Case Law Also Provides That In The Absence Of A Punitive Damages Award, No Attorneys' Fees May Be Awarded. The Only Way To Read These Two Lines Of Case Law *In Para Materia* Is To Conclude That Since Only The Jury May Award Punitive Damages, Then Only The Jury May Award Attorneys' Fees In Lieu of Punitive Damages. That Being The Case, The Plaintiffs Application To The Trial Judge For An Award of Attorneys' Fees Is Without Merit Because Only the Jury Has The Authority To Render Such An Award

The Plaintiffs argue the Aqua-Culture[7] case stands for the proposition that "the Court may award Plaintiffs attorney fees, despite the fact no punitive damages were awarded, if it finds, given defendant's conduct, punitive damages would have been proper."[8] As the importance will be shown below, the Court should bear in mind that the Aqua-Culture case was in Chancery and the Chancellor, not a jury, was the fact-finder.

To properly frame the issue of an award of attorneys' fees, punitive damages must be understood. First, the law provides punitive damages may only be awarded by a jury.[9] Friendly Finance Company v. Mallett, 243 So2d 403, 407 (Miss. 1971). A jury may not be instructed by the Court that it must award punitive damages. "[T]he imposition of punitive damages is a matter within the discretion of the jury. The jury may or may not award exemplary damages where the evidence justifies such infliction." Southeastern Express Co. v. Thompson, 139 Miss. 344, 104 So. 80 (1925).

If the jury decides to award punitive damages, the size of the award is likewise a matter for the jury's discretion. Reserve Life Ins. Co. v. McGee, 444 So2d 803, 812 (Miss. 1983) ("We have said in many cases that the amount of punitive damages is a discretionary question for the jury....").

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[7] Aqua-Culture Technologies, Ltd. v. Holly, 677 So2d 171 (Miss. 1996).

[8] See Plaintiffs' Motion For Attorneys Fees, Prejudgment Interest and Post-Judgment Interest dated January 28, 2015, and filed with the clerk on January 29, 2015, at page 2.

[9] Or by a judge sitting as a fact-finder.

These decisions are now placed in context by *Miss. Code Ann. §11-1-65(d).* In this statue, the legislature has provided it is a question of law for the court to determine "whether the issue of punitive damages may be submitted to the trier of fact." It then becomes a matter for the jury, in its ***fact-finding role***, to "determine whether to award punitive damages and in what amount."

The correct reading of Aqua-Culture is that "Attorneys' fees may be awarded instead of punitive damages." Pursue Energy Corp. v. Abernathy, 77 So3d 1094, 1101 (Miss. 2011).[10] However, the case law also makes it clear that "if the jury does not award punitive damages, 'attorneys' fees are clearly not to be awarded by the trial judge.'" Fulton v. Miss. Farm Bureau Cas. Ins. Co., 105 So3d 284, 288 (Miss. 2012). Stated another way, "because no punitive damages were awarded, no independent grounds existed for a post-judgment award of attorney's fees." Fulton v. Miss. Farm Bureau Cas. Ins. Co., 105 So3d at 290. The Fulton court reached these conclusions in 2012 without even referencing the Aqua-Culture case.

The issue before this court is how to read both Aqua-Culture and Fulton in *para materia* so that they both mean something. Otherwise the Supreme Court has two diametrically opposed decisions which cannot be harmonized.

The answer to the conundrum is simple. The case law may be harmonized by concluding that since only the jury may award punitive damages, only the jury may award attorneys' fees in lieu of punitive damages. It may also be harmonized by concluding that the judge may award attorneys' fees in lieu of punitive damages; but only after the jury has been submitted and ruled on the question of whether to award punitive damages. In this case the trial judge decided as a matter of law, the case did not warrant punitive damages and she denied the Plaintiffs motion to submit the matter to the jury on punitive damages.

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[10] The Abernathy case made this specific reference to the Aqua-Culture case.

To allow what the Plaintiffs now ask would be to allow the judge to take from the jury the right to decide whether punitive damages should have been awarded and to make the judge the ***fact-finder*** with the authority to decide that instead of punitive damages, the Plaintiffs should be awarded attorneys' fees.

Who knows what would have happened if the judge had submitted the case to the jury on punitive damages. The jury could have returned a verdict which was large enough to have subsumed the issue of attorneys' fees or could have brought back a verdict including, among other things, the specific amount of attorneys' fees demanded. However, since the judge refused to submit the case to the jury on the issue of punitive damages, what would have happened will never be known.

> The Plaintiffs Asked The Court To Submit Their Case To The Jury On A Charge For A General Verdict. The Jury As Instructed Rendered A General Verdict. It Would Now Be Impossible For The Court, Without Guessing, To Try To Decide Whether The Jury Found The Defendant Guilty Of Any Misconduct Warranting An Award of Attorneys' Fees

Rule 49, Miss. R. Civ. P., provides three different ways to submit a case to a jury. It may be submitted on a general verdict which is "a single determination that disposes of the entire case." Secondly, it may be submitted to a special verdict which "requires the jury to decide specific factual issues." Finally it may be submitted on a "general verdict with written interrogatories about specific factual issues to the jury." See: In re Rules of Civ. Procedure, 2014 Miss. LEXIS 288 (June 9, 2014).[11]

When the case is submitted to the jury on a general verdict, it is impossible for the court to later say why the jury awarded what it did. Thompson v. Nguyen, 86 So3d 232, 238 (Miss. 2012) ("because the verdict was a general verdict, we cannot say for sure whether $9,131 was the exact

[11] The most recent set of amendments to the Rules of Civil Procedure.

award."); and, DC General Contractors, Inc. v. Slay Steel, Inc., 109 So3d 577, 585 (Miss. App. 2013) ("Because the verdict of the jury was a general verdict, we cannot say for sure why the jury decided upon $41,500 in damages.")

The Plaintiffs in this case could have submitted the case to the jury on a special verdict or on a general verdict with written interrogatories. They chose not to. This court cannot therefore determine, without guessing, what fact or facts supported the jury's verdict; or, what cause or causes of action were proven to the jury's satisfaction.

More specifically, the Court cannot now guess whether the jury found the defendant guilty "by clear and convincing evidence"[12] of misconduct rising to the level of an act or acts done "with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud."[13] These, of course, being the statutory prerequisites for an award of punitive damages under *Miss. Code Ann. §11-1-65 (1)(a);* none of which the jury was instructed on.

The Plaintiffs submitted the case on a general verdict. The court cannot now without guessing determine exactly what factual findings the jury made. The court therefore has no way to determine whether the predicate findings for an award of punitive damages or in lieu thereof an award of attorneys' fees has been made. An award of attorneys' fees cannot therefore be made by the court.

> An Award of Attorneys' Fees Is The Amount Necessary To Secure One Competent Attorney. The Purpose of the "One Competent Attorney" Rule Is To Avoid Duplicate Billing. Plaintiff, John Robinson, Represented Himself *Pro Se.* Because of *Miss. R. Prof. Conduct 4.2* Attorney Robinson Was Required to Bring

[12] Which burden of proof the jury was not even instructed on.

[13] Again matters which the jury was not instructed on.

In A Second Attorney, John Sneed, To Try The Case. Nevertheless, Both Messrs. Robinson and Sneed Are Billing For Trial Preparation And Trial. This Duplicate Billing Violates the "One Competent Attorney" Rule And Should Be Disallowed

Assuming *arguendo* the court rejects the above arguments, there are still problems with an attorneys' fee award.

The general rule is that an award of attorney fees "should be awarded in an amount to secure one competent attorney...." Mabus v. Mabus, 910 So2d 486, 490 (Miss. 2005). The purpose of the rule is to avoid duplicate costs. *Id.* John Robinson and John Sneed have both submitted bills for trial preparation and trial.

As an example, just for the trial dates, the following duplicate billing has been submitted:

Date	John Robinson Hours	John Sneed Hours
Dec. 15	12.0	13.5
Dec. 16	12.0	12.9
Dec. 17	12.0	13.3
Dec. 18	12.0	12.2
Dec. 19	12.0	15.4
	60.0	67.3
	x $215 hr	x $250 hr
	$12,900	$16,825

John Robinson billed a total of $106,079.99 and John Sneed billed an additional $45,158.00. The aggregate total billing is $151,237.99. All of John Sneed's billing was for getting ready for the trial and the trial. All of John Sneed's billing was due to John Robinson's appearing *pro se* and being prevented by Rule 4.2, Miss. R. Prof. Conduct, from appearing at trial both as an advocate and as a witness on contested, material issues of fact.

In these circumstances to avoid duplicate billing or just to avoid the extra billing associated with a need for a second attorney, a need created by the Plaintiffs, themselves, the court should

discount the bill by the full amount of John Sneed's fees which, as stated above, are $45,158.00.

The Documentary Calculations and Statements on the McKee Factors By Plaintiffs' Counsel On The Issue of Attorneys' Fees Are Purely Advisory And Not Binding On The Court

Plaintiffs' counsel have tendered the Court their opinions on the McKee[14] factors. However, "It is well settled in this State that what constitutes a reasonable attorney's fee rests within the sound discretion of the trial court and any testimony by attorneys with respect to such fee is purely advisory and not binding on the trial court." Smotherman v. Columbus Hotel Co., 741 So2d 259, 269 (Miss. 1999).

Defendant, Roger Latham, contends for the reasons set out herein, the Plaintiffs are entitled to no award of attorneys' fees. Nevertheless, if awarded, they should be no more than the cost of one competent attorney which in this case is a ***maximum*** of $106,080.

Plaintiffs' Damages Were Not Liquidated And There Has Been No Proof That Punitive Damages Were Warranted. Plaintiffs Are Therefore Not Entitled to Pre-Judgment Interest

Damages are "liquidated" when they are "set or determined by a contract when a breach occurs....Unliquidated damages are damages that have been established by a verdict or award but cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." Sports Page, Inc. v. Punzo, 900 So2d 1193, 1206-07 (Miss. App. 2004). "No award of prejudgment interest may rationally be made where the principal amount has not been fixed prior to judgment." *Id.* at 1205.

Plaintiffs argue their damages were liquidated and punitive damages were warranted. Therefore, they are entitled to an award of pre-judgment interest. With the exception of breach of a

[14] McKee v. McKee, 418 So2d 764, 767 (Miss. 1982); now codified in Rule 1.5 of the Mississippi Rules of Professional Conduct. These factors are evaluated by the court to determine a "reasonable" attorneys' fee award.

partnership agreement, all the causes of action alleged were torts. Torts are by their very nature unliquidated.

Plaintiffs allege their damages were "based on breach of a partnership agreement."[15] The breach of the partnership agreement argument will not support a claim for pre-judgment interest for several reasons. First, because this was a general verdict, for the reasons discussed above, it is now impossible for the court to determine what cause or causes of action upon which the jury based its verdict and likewise impossible to determine whether the jury found punitive damages warranted. Since the judge may not make the punitive damages decision for the now discharged jury, there is no basis for the Plaintiffs to claim that "punitive damages were warranted."

Second, the jury in this case returned with three different verdicts and a fourth simply asking "What do the Plaintiffs want?" Clearly, in these circumstances it cannot be argued the damages were liquidated, viz. – "principal amount...fixed prior to judgment." Sports Page, Inc. v. Punzo, 900 So2d 1193, 1205 (Miss. App. 2004).

Finally, the court need look no further than the jury instructions submitted by the Plaintiffs. In the instruction originally numbered as Jury Instruction No. P-6[16] Plaintiffs set out their most comprehensive jury instruction on their breach of partnership agreement. Although they now claim the damages from the agreement were liquidated, their instruction P-6 defines the damages thusly:

> "[Y]ou must determine what damage, if any, was proximately caused by such act or omission that constituted a breach of partnership....If you find that the plaintiffs are entitled to a verdict, you may award the plaintiff such damages as will reasonably compensate for such injury and damages as you find, from a preponderance of the evidence, plaintiffs have sustained as a result of the acts of the defendant."

Needless to say the Plaintiffs jury instruction P-6 hardly defines what Plaintiffs now contend

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[15] See Plaintiffs' Motion at page 8.

[16] This jury instruction is a part of Exhibit (A) attached to Defendant's Response In Opposition.

were liquidated damages. For all these reasons Plaintiffs are not entitled to an award of pre-judgment interest.

> Plaintiffs Are Incorrect In Their Argument That The Law Requires Pre-Judgment and Post-Judgment Interest Be Compounded. Under *Miss. Code Ann. §75-17-7* The Rate And Whether It Is Compounded Or Simple Is A Matter Within The Court's Discretion

The applicable statute is *Miss. Code Ann. §75-17-7*. It provides:

> "All judgments or decrees on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. ***All other judgments*** or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint." (emphasis added)

Plaintiffs argue that "Under Mississippi law, prejudgment interest accrues at he rate of 8% per annum, compounded annually."[17] A correct statement of the law is found in McNeel v. Miss. Dept of Human Servs., ___ So3d ___, 2011 Miss. App. LEXIS 683, 2011 WL 5373668 (Miss. App. 2011). There, the Court of Appeals said:

> "The general rule is that when interest is allowable, it is to be computed on a simple rather than compound basis in the absence of express authorization otherwise...*Mississippi Code Annotated section 75-17-7* (Rev. 2009) allows the trial court to set the rate and, in effect, the method of its calculation. *See Estate of Baxter v. Shaw Assocs., Inc., 797 So2d 396, 407 (¶48) (Miss. Ct. App. 2001).* Pursuant to section 75-17-7, the trial court could decide whether pre-judgment interest was simple or compound." *Id.* at ¶7.[18]

Contrary to Plaintiffs argument, the court is not compelled by law to make the interest compound. It is within the court's discretion to set both the interest rate and its method of

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[17] See Plaintiffs' January 28, 2015, Motion For Attorney Fees, Prejudgment Interest And Post-Judgment Interest, at page 9.

[18] Note that Baxter is the case cited by Plaintiffs in support of their proposition that compound interest is mandatory.

calculation. Plaintiff contends the rate should be no more than 8% and its method of calculation both pre-judgment as well as post-judgment should be simple.

> Plaintiffs Are Incorrect In Their Argument The Law Requires That Pre-Judgment Interest Be Paid From The Date of Breach. Under *Miss. Code Ann. §75-17-7,* It Is To Be Paid "from a date determined by such judge to be fair but in no event prior to the filing of the complaint."

Plaintiffs argue pre-judgment interest should be paid from the date of the breach of the partnership contract.[19] This is in error.

As noted above the applicable statute is *Miss. Code Ann. §75-17-7* which provides that the date from which pre-judgment interest shall be paid is "a date determined by such judge to be fair ***but in no event prior to the filing of the complaint***." (emphasis added) In this case the complaint was filed on March 14, 2011. That is the earliest date from which interest should be calculated.

Summary

The Court should deny the Motion to Suspend Record Preparation in this action.

This the 12th day of March, 2016.

Respectfully submitted,

Roger Dale Latham, *Appellant*

/s/ J. Edward Rainer
J. Edward Rainer, *Attorney for Appellant*

[19] See Plaintiffs' January 28, 2015, Motion For Attorney Fees, Prejudgment Interest And Post-Judgment Interest, at page 8.

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Margaret Carey-McCray
Circuit Court Judge
Post Office Box 1775
Greenville, MS 38702-1775
ahoward@co.washington.ms.us

John P. Sneed, Esq.
Wise Carter Child & Caraway, P.A.
P. O. Box 651
Jackson, MS 39205-0651
email: jps@wisecarter.com

John W. Robinson, III, Esq.
618 Crescent Blvd., Suite 200
Ridgeland, MS 39157
email: jwr@jwrobinsonlaw.com

Preston Rideout, Esq.
Abraham & Rideout
203 Walthall Street
Greenwood, MS 38930-4428
email: bo@borideout.com

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

None.

Dated, this the 12th day of March, 2016.

/s/ J. Edward Rainer
J. Edward Rainer, *Attorney for Plaintiff*

PREPARED BY:

J. Edward Rainer
Mississippi Bar No. 4602
RAINER LAW FIRM, PLLC
Post Office Box 258
Brandon, Mississippi 39043
T: (601) 825-0212
F: (601) 825-0219
erainer@rainerlaw.net